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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDY LUNA,

Defendant and Appellant.

B297185

Los Angeles County

Super. Ct. No. BA470797

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Johanna Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, David A. Madeo, Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant and defendant Freddy Luna pled guilty to one count of sale, offer to sell, or transportation of a controlled substance. On appeal, Luna contends the trial court abused its discretion by denying his motion to withdraw his plea. He argues the discovery of a material witness after he entered his plea constituted clear and convincing evidence of good cause to withdraw his plea. The Attorney General responds the trial court properly denied Luna's motion, as the witness's statements would not have supported any new defenses or theories of innocence.

We agree with the Attorney General. Accordingly, the judgment is affirmed.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney filed an information charging Luna and co-defendant Tanielu Matagiese with one count of sale, offer to sell, or transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a); count one) and one count of possession for sale of a controlled substance (Health & Saf. Code, § 11378; count two). The information further alleged Luna sustained a prior strike conviction within the meaning of the Three Strikes Law (Pen. Code §§ 667, subd. (d), 1170.12, subd. (d))¹, and six prior prison term convictions (§ 667.5, subd. (b)).

Luna pled guilty to count one and agreed to waive custody credits for time served between his arrest and entry of his plea. In exchange, the People requested that the trial court sentence

¹ All undesignated statutory references are to the Penal Code.

Luna to the low term of two years in prison. The trial court accepted Luna's plea.

Before sentencing, Luna moved to withdraw his guilty plea, arguing: (1) when he entered his plea, he did not understand he would be waiving custody credits earned from the time of his arrest to the date of his plea; and (2) after entering his plea, he located a "necessary defense witness" who was "ready and willing to testify on his behalf." The trial court denied the motion, finding Luna did not demonstrate good cause for withdrawing his plea.

On count one, the trial court sentenced Luna to a two-year prison term with 102 days of custody credits (51 days spent in custody between entry of his plea and sentencing plus 51 days for good time/work time). The trial court further ordered Luna to pay a \$300 restitution fine, a \$40 court operations assessment, and a \$30 conviction assessment.² Count two was dismissed.

Luna timely appealed. Thereafter, the trial court granted Luna's request for a certificate of probable cause.

FACTUAL BACKGROUND

In the early evening of August 23, 2018, Los Angeles Police Department Officer Micah Braun and his partner were working undercover near the intersection of Maple and 6th Streets. While in their car, Officer Braun and his partner observed Matagiese talking to another individual near a blue tent. That individual made eye contact with Officer Braun and approached their vehicle. At that point, Officer Braun told the individual he wanted to purchase 40 grams of crystal methamphetamine. The

² The trial court also ordered and suspended Luna's payment of a \$300 parole revocation restitution fine.

individual instructed Officer Braun to drive around the block and re-park in roughly the same spot.

Five to ten minutes after Officer Braun and his partner followed the instructions given, Matagiese approached them. He pointed at Luna and stated: “There he is. That’s the guy right there, he has it.” Subsequently, Matagiese and Luna entered the blue tent. Approximately one minute later, Matagiese exited the tent and re-approached Officer Braun to inform him they only had \$10 and \$20 worth of drugs. Officer Braun agreed to purchase \$20 worth and gave Matagiese a pre-recorded \$20 bill. Matagiese accepted the bill and re-entered the tent. When Matagiese returned, he gave Officer Braun a clear bindle containing “multiple crystalline solids resembling methamphetamine.”³

Shortly thereafter, Luna and Matagiese were arrested. The police searched the blue tent and recovered “a clear plastic cylindrical container” containing “a torn plastic bindle matching the same bindle that [Officer Braun] had in [his] possession[.]” They also found \$36 in cash, which included the pre-recorded \$20 bill Officer Braun had given to Matagiese. Luna told the police he owned the tent and all of the belongings inside of it.

DISCUSSION

Section 1018 provides, in pertinent part: “On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.”

³ The parties stipulated the bindle contained 0.5 grams of crystal methamphetamine.

“The defendant has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal of his or her guilty plea. [Citations.] ‘A plea may not be withdrawn simply because the defendant has changed his [or her] mind.’ [Citation.]” (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.) “To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. [Citation.]” (*Id.* at p. 1416.)

We review a trial court’s denial of a motion to withdraw a plea under section 1018 for abuse of discretion. (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1506 (*Ramirez*).)

Luna contends the trial court erred by denying his motion to withdraw his plea because, “after [he] entered his plea, he discovered the existence of a material witness” whose “testimony could have cast doubt on [his] participation in the crimes charged.”⁴ In support of this argument, Luna analogizes this case to *Ramirez, supra*, 141 Cal.App.4th 1501, and *People v. Dena* (1972) 25 Cal.App.3d 1001 (*Dena*). We are unconvinced.

In *Dena*, the defendant pled guilty to a burglary charge. (*Dena, supra*, 25 Cal.App.3d at p. 1003.) He later moved to set aside his plea based on the prosecution’s willful suppression of exculpatory evidence. (*Id.* at pp. 1004-1005.) Specifically, the prosecution did not inform the defendant that, contrary to its original advice that the police likely took his blood sample within

4 Luna does not contend the trial court erred by finding the other ground on which he sought to withdraw his plea – that he did not understand he would be waiving custody credits for the time between his arrest and the entry of his plea – not credible.

30 minutes of his arrest, the police actually took it over an hour after he was arrested. (*Id.* at pp. 1006-1007.) At the hearing on the motion, the defendant's medical advisor opined this information could have supported a defense of diminished capacity due to intoxication. (*Id.* at p. 1009.) The trial court denied the motion. (*Id.* at p. 1008.)

The Court of Appeal reversed, reasoning the prosecution's "fail[ure] to disclose the true facts to defense counsel . . . deprived the defendant of the right to assert a defense to the charge." (*Dena, supra*, 25 Cal.App.3d at pp. 1009, 1013.) Consequently, the *Dena* court held "clear, convincing and uncontroverted evidence support[ed] the defendant's contention that his guilty plea was entered due to factors outside his control which overcame his exercise of free judgment." (*Id.* at p. 1013.)

In *Ramirez*, the defendant was arrested for his alleged involvement in the carjacking of a Mini Cooper, the robbery of a man at gunpoint, and a car chase with the police involving the stolen vehicle. (*Ramirez, supra*, 141 Cal.App.4th at pp. 1503-1504.) The defendant pled no contest to one count of armed robbery and one count of evading arrest in exchange for a reduced prison term and the dismissal of two counts of carjacking and one count of unlawful driving. (*Ibid.*) Subsequently, the defendant moved to withdraw his plea based on the prosecution's failure to disclose a supplemental police report containing exculpatory information. (*Id.* at pp. 1503, 1505.) Specifically, the supplemental police report contained statements by numerous witnesses identifying a different person as the carjacking culprit. (*Id.* at pp. 1504-1505.) The report's witness statements also suggested the defendant was not driving the Mini Cooper during the car chase with the police. (*Id.* at p. 1507.) The trial court

denied the defendant's motion to withdraw his plea. (*Id.* at p. 1505.)

The Court of Appeal concluded the trial court abused its discretion by denying the defendant's motion. (*Ramirez, supra*, 141 Cal.App.4th at p. 1507.) Specifically, the *Ramirez* court held the defendant "established by clear and convincing evidence that the prosecution's withholding of favorable evidence affected his judgment in entering his plea, rendering the waiver of rights involuntary." (*Id.* at pp. 1507-1508.) In support of its holding, the *Ramirez* court emphasized that although "the new information did not uncontrovertibly exonerate" the defendant, "[t]he supplemental report identified new defense witnesses, potentially reduced [the defendant's] custody exposure, and provided possible defenses to several charges, thereby casting the case against him in an entirely different light." (*Id.* at p. 1508.)

Here, in contrast to *Dena* and *Ramirez*, Luna does not seek to withdraw his plea based on the prosecution's failure to disclose favorable information. Rather, Luna contends he is entitled to withdraw his plea not because of anything the prosecution did or did not do, but because he claims he located a witness he previously was unable to contact. Additionally, and more importantly, unlike the defendants in *Dena* and *Ramirez*, Luna has not shown the witness could have offered any exculpatory information. In his declaration, the witness stated that on the date of Luna's arrest, he "gave [Luna] a twenty dollar payment" in exchange for "tattoo work" to be done at a later time. This information, however, does not contradict or otherwise undermine the evidence demonstrating Luna's participation in the narcotics sale leading to his arrest. In particular, the witness's statement does not conflict with or provide an innocent

explanation for the presence in Luna's tent of the pre-recorded \$20 bill. The witness did not state that he paid Luna with the pre-recorded \$20 bill, nor even that his "twenty dollar payment" to Luna consisted of a single \$20 bill. Nor did the witness state this payment took place just before Luna was arrested. Consequently, it is entirely possible that Luna received \$20 from the witness, spent \$4, and later received the pre-recorded \$20 bill from Officer Braun in exchange for crystal methamphetamine. The witness's statements therefore do not "cast doubt on [Luna's] participation in the crimes charged" as Luna contends.

Under these circumstances, the trial court could reasonably conclude the witness's testimony was not exculpatory and would not have supported any new theories of innocence or possible defenses. Accordingly, the trial court did not abuse its discretion by finding Luna failed to provide clear and convincing evidence of good cause to withdraw his guilty plea.

DISPOSITION

The judgment is affirmed.

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CURREY, J.

We concur:

MANELLA, P.J.

COLLINS, J.